Crl.A. 254/2003
BEFORE
THE HON'BLE MR JUSTICE D. BISWAS, CHIEF JUSTICE(ACTG.)

JUDGMENT AND ORDER(CAV)

This appeal is directed against the judgment dated 16th July, 2003 passed by the learned Asstt.Sessions Judge, Barpeta in Sessions Case No.36/2002. The learned Asstt.Sessions Judge, by the judgment under appeal, convicted the appellant Jahidul Islam u/s 376 IPC for outraging the modesty of Mustt. Ramisha Dewan and sentenced him to R/I for 4(four) years and to pay a fine of Rs.1,000/-, in default, further R/I for 3(three) months.

2. This is a case of conviction u/s 376 IPC. Mustt. Ramisha Dewan is the victim. On 14.9.98 around noon she went to Maa Phatema Pharmacy owned by the accused Johidul Islam to purchase medicine. She was called inside the pharmacy by the accused. As soon as she entered, the accused bolted the door, laid her on the ground, pressed her mouth by a towel, and raped her against her will forcefully. The victim tried to resist, but failed. The victim also raised alarm. Many people gathered there. The accused then fled away by the back door of the pharmacy. There was a village Mel over this issue, but the dispute could not be resolved. Thereafter the FIR was filed on 26.9.98.

3. The police registered a case and eventually on completion of investigation submitted charge sheet against the accused who was tried by the learned Sessions Judge u/s 376 IPC and convicted as aforesaid.

4. During the course of trial, 7 witnesses were examined by the prosecution including the medical officer and the police officer. At the very outset, I would like to refer to the evidence of the victim examined as PW1.

5. PW1 Mustt. Ramisha Dewan in her examination in chief stated that when she went to the pharmacy of the accused to buy medicine, the accused, who was then alone called her inside. When she entered the pharmacy the accused closed the door. PW1 resisted but the accused pressed her mouth by a towel, laid her on the ground and raped her. She raised alarm. After she was released, a lot of people gathered there and, at their sight, the accused fled away through the backside of the pharmacy. She came out of the pharmacy and saw her brother Abdul Kalam and reported him about the occurrence. Thereafter, she reported the matter to the village headman and others. A village Mel was convened for three consecutive days. The accused did not appear in the Mel. It was only then she filed the FIR(Ext. 1) before the police.

6. PW2 Abldul Kalam Azad is the brother of the PW1. He is the cousin of the accused. He went to Khandakarpara market to purchase beedi. He saw gathering in front of the pharmacy of the accused. While he went there, he saw the accused running away through the back door of the pharmacy and his sister inside the pharmacy was crying. His sister PW1 reported him that the accused had raped her forcefully. Then they went to the house of the village headman and reported the matter. The village headman convened village Mel times, but could not procure presence of the accused. Thereafter, the FIR was lodged.

7. PW3 is the father of the victim and uncle of the accused. He was not present at the time of occurrence. He heard about the occurrence from villagers. He came to the market and enquired about the matter from PW1. Then he went to the house of village headman along with Ramisha to report about the occurrence.

8. Of the 3 witnesses referred to above, PW1 is the victim, PW2 and 3 are the brother and father of the victim, PWs 2 and 3 were not present at the time of occurrence. They came after the incident. These three witnesses were cross-examined. Nothing significant could be brought out of them to reject their evidence straightway. At least their evidence suggest that there was an occurrence in the pharmacy of the accused.

9. The evidence of PW5, the village headman, shows that he heard about the occurrence and went to the market where he was told that the accused had raped Ramisha in his pharmacy by closing the door. On being asked by the people, the door of the pharmacy was opened after a long time and they did not find the accused there.

10. PW1 is the victim. She has stated that she tried her best to resist. In the process, the buttons of her blouse were also torn. She stated that the accused raped her forcefully gagging her mouth with the help of a towel, but PW4, Dr BK Sarkar who had examined PW1 stated that her age was above 18 years. There was no sign of recent sexual intercourse. There was also no injury mark on her person. The doctor further opined that PW1 was habituated in sexual intercourse. In cross-examination, also the doctor repeated the same. The doctor further deposed that had there been application of force, there might have been sign of injuries.

11. The evidence of PW4, the medical officer, negate the story of rape. It is a fact that PW1 was found inside the pharmacy when the door was opened on the insistence of the people. There was delay in opening the door. The accused was earlier inside the pharmacy, and he had fled away from there by the backdoor. If PW1 was resisting as claimed, she should have also tried to prevent the accused from running away from the place of occurrence. A large number of people were already there and it would have been difficult for him to escape had she been really sincere in getting him apprehended. She voluntarily went to the pharmacy. No alarm was raised by her when the door was closed. Absence of injury on her person further shows that there was no resistance at all. The delay in lodging the FIR, which remains unexplained, also weakens the prosecution case. In all probability, it may at best amount to a case of outraging the modesty of PW1 and nothing more than that. Therefore, the conviction u/s 376 IPC of the appellant cannot be sustained. A case of conviction u/s 354 IPC is made out. Therefore, the conviction is modified and altered to one u/s 354 IPC. The appellant is convicted accordingly. On such conviction, the appellant Johidul Islam is sentenced to the period already spent in custody. The appellant is already on bail. The bail bond stands discharged.